

The Elephant in the Room*

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Many metaphors have been used to describe Collaborative Practice, but in my mind, none does it as effectively as the *collaborative container*¹. To Stuart Webb's question, "**Why not create this settlement climate deliberately?**", the *collaborative container* provides the perfect visual response. The penny, however, didn't drop immediately; it took some time to fully appreciate the magic of the metaphor.

In the initial phase of my involvement with Collaborative Practice, I was so taken by the image of the container, that I actually got my carpenter to build a miniature wooden house. Universally, but especially for us Italians, the idea of home is imbued with feelings of safety, trust and protection. A physical house perfectly represents a space within which conflict can be dealt with and resolved, because the solidity of the structure, its foundation, its walls, its roof, offer the same protections and guarantees to its inhabitants as the tenets of Collaborative Practice.

Recently, after spending a week at Harvard Negotiation Institute,² I have started thinking more about the space outside the *collaborative container*.

IACP President Christopher Farish's letter in the July Issue of *The Collaborative Review* was the final icing on the cake that let me look from inside to outside the "house".

In my early years of training in Collaborative Practice, interest-based negotiation was taught in its integrated version of Collaborative Practice, skipping a deeper knowledge and without any practical experience of interest-based negotiation without the Collaborative Practice integration. As a consequence, I hadn't truly grasped its value and how it differs from collaborative negotiation.

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1. GOREN SLOVIN, *The "Building" Metaphor and ... Building the Metaphor in The Collaborative Review*, Spring 2010, 11; TESLER, *Collaborative Law. Achieving Effective Resolution in Divorce Without Litigation*, III ed., American Bar Association, 2016, 59-84; SCHARFF, HERRICK, *Navigating Emotional Currents in Collaborative Divorce. A Guide to Enlightened Team Practice*, American Bar Association, 2010, 31-60.

² *Negotiation Workshop: Strategies, Tools, and Skills for Success* con Robert C. Bordone, Program on Negotiation at Harvard Law School – Harvard Negotiation Institute, 10-14 June 2019, Cambridge (U.S.A.).

Three summers ago, when my dear friend and colleague Elisabetta Zecca and I retreated to my country house to work undisturbed on our respective chapters in the book *La Pratica Collaborativa – Dialogo fra teoria e prassi*³, we got all tangled up trying to understand where BATNA ends up in the collaborative container and how its role changes based on whether it is inside or outside.

Obviously, we had poured over the gospels of Collaborative Practice, starting from *Getting to Yes* by Fisher, Ury and Patton, but what we really needed was complete clarity about the different applications of the two methods. Unable to find satisfying answers, despite our best efforts, we concluded that there was indeed an *Elephant in the Room*. To this day I'm sentimental about the bright orange coffee mug with a jolly elephant on it, gifted to me by Elisabetta to preserve the memory of our late into the night reflections.

This open query led me this last June to attend a course on Negotiation at The Harvard Negotiation Institute, along with an Elisabetta, this time Elisabetta Valentini, another dear friend and colleague. To be perfectly honest, I was driven to Harvard, not only by the question that had vexed Elisabetta Zecca and myself, but also by an urgency - the urgency to understand how negotiation is feasible in the space between, on the one hand positional bargaining, the status quo in Italian legal education and practice and the background for me and all Italian lawyers, and on the other hand Collaborative Practice, introduced in our country only in 2010.

How could I avoid, when outside the collaborative container, getting caught up in the ubiquitous, but to me wholly disagreeable, zero-sum game of positional bargaining?

At Harvard I experienced my Eureka moment!

Today, a few months down the road, I'm making a full circle back to my handcrafted wooden miniature house. Collaborative Practice is without doubt the ideal method, the safest method, too, thanks to the container within the walls of which collaborative negotiation is undertaken. But when

³ *La Pratica Collaborativa. Dialogo fra teoria e prassi* edited by SALA, MENICHINO, Utet, 2017.

we are outside the protective walls of the house, out in the green fields, or in the nature reserve surrounding the house (as we defined it together with Christina Mordiglia and Elisabetta Valentini while preparing for the workshop in Chicago⁴), positional bargaining doesn't have to be the default position.

According to the problem-solving approach in integrative contexts, in situations when collaborative negotiation is not an option, interest-based negotiation can be an alternative, and thus we don't waste any value by ceding ground to the standard-issue positional negotiation.

Just like the *continuum* of procedural options, there is also a *continuum* of negotiation: positional, interest-based and collaborative, and today I'm clearly able to distinguish between the last two.

Having interest-based negotiation (differentiated from collaborative negotiation) in the viewfinder presents several advantages.

1. With interest-based negotiation in the equation, the choice is no longer a binary one between positional or collaborative. Interest-based negotiation's alternative third way can potentially become a game changer, as it can be applied in the myriad cases that play out outside the collaborative container, thus beyond the preserve of collaborative negotiation, which otherwise would come under the fallback jurisdiction of positional bargaining. The exponential growth in the number of cases could be significant.
2. A clear understanding of collaborative negotiation and interest-based negotiation, as well as of their different application context circumvents the vagaries when a case falls into the grey zone, thus avoiding hybrid cases.
3. It provides lawyers who are curious about Collaborative Practice, but unable to take the plunge, because initially Collaborative Practice can seem extreme to some, an intermediary phase to acclimatize themselves before they can make the necessary paradigm shift that collaborative professionals must eventually make. Such a graduated, gentler approach should eventually bring many more lawyers into the collaborative practice fold.

⁴ Let's go into Carla's house and brainstorm on Collaborative Containers with CARLA MARCUCCI, CRISTINA MORDIGLIA and ELISABETTA VALENTINI at the 20th IACP Forum "Celebrating 20 Years of Inspiration and Counting," 24-27 October 2019, Chicago.

For those who arrive at interest-based negotiation directly, that is without first going through Collaborative Practice, all of the above might be obvious. But others, who first used this kind of negotiation in Collaborative Practice, might be under the impression that it's only applicable within the container, thus not realizing the wealth of resources available outside of it.

I could say that the Non-positional Negotiator is a professional "genus", much wider than the "species" Collaborative Professional. Both employ the same tools, but differently because the latter can use them within a safe container. Thus, it would be a great added value and enrichment if each side learnt the methodology of the other.

Last but not least, I found the final piece of the puzzle in our President Christopher Farish's wonderful letter announcing and commenting on IACP's New Statement Mission 2019. I find it fundamental and extremely positive that IACP opens its doors to everyone who is engaged "*To transform the way families resolve conflict by building a global community of Collaborative Practice and consensual dispute resolution professionals*"⁵ notwithstanding some different approaches. This shared purpose will let us go beyond individual ideas and experiences and let us work all together, fully aware of the differences and despite them.

I know that the expression *An Elephant in the Room* usually has a negative ring to it. My elephant, however, has been an eye-opener to something entirely positive, filling me with energy and passion, derived from the recognition that by widening the playing field we can multiply the resources available to change ourselves and the world around us.

Christopher Farish's letter concludes with the words "*Come inside! Come inside!*", by Emerson, Lake & Palmer. It's fitting therefore for me to conclude with two short English words, *Inside Out*, that remind us that it's not one or the other, but both simultaneously, just as Gary Friedman⁶ teaches so well.

⁵ In the cited *Letter from the President*.

⁶ FRIEDMAN, *Inside Out. How Conflict Professionals can use Self-Reflection to Help Their Clients*, American Bar Association, 2015 and Italian edition *Inside Out. Strumenti di auto-riflessione per mediatori e altri professionisti del conflitto per sostenere e assistere meglio le parti*, translated by Laura Ristori, Aracne, 2019.